92-634

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1992

STATE OF ALABAMA,

PETITIONER,

v.

McRAY GINGO, and
ATLAS INDUSTRIAL PAINTERS, INC.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION OF THE STATE OF ALABAMA

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

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ROBERT DOUGLAS TAMBLING

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DECISION OF THE SUPREME COURT OF ALABAMA CREATING AN EXCEPTION TO THE DOCTRINE OF ARIZONA v. YOUNGBLOOD IS CONTRARY TO CALIFORNIA v. TROMBETTA AND TO THE APPLICATION OF BOTH YOUNGBLOOD AND TROMBETTA BY THE COURTS OF VARIOUS JURISDICTIONS?

II. WHETHER THE DECISION OF THE SUPREME COURT OF ALABAMA REGARDING THE DESTRUCTION OF EVIDENCE IN THE HANDS OF A SEPARATE GOVERNMENT CONFLICTS WITH THOSE OF OTHER JURISDICTIONS ON THIS QUESTION?

TABLE OF AUTHORITIES

CASES	PAGES
Arizona v. Youngblood, 488 U.S. 51 (1988)	passim
California v. Trombetta, 467 U.S. 479(1984)	passim
Commonwealth v. Dennis, 588 A.2d 30 (Pa. 1991)	17
Ex parte McRay Gingo, No. 1910360 (Ala. April 17, 1992)	13, 19
State v. Mabe, 412 S.Ed.2d 386 (S.C. 1991)	17
Thor v. United States, 574 F.2d 215 (5th Cir. 1978)	20
United States v. Belden, 957 F.2d 671 (9th Cir. 1992), cert. denied, 425 U.S. 970 1976	15
United States v. Bermudez, 526 F.2d 89 (2nd Cir. 1975)	20
United States v. Donaldson, 915 F.2d 612 (10th Cir. 1990)	16
United States v. Harris, 738 F.2d 1068 (9th Cir. 1984), cert. denied, 484 U.S. 832 (1987)	19
United States v. Malbrough, 922 F.2d 458 (8th Cir. 1990), cert. denied, 111 S.Ct. 2907 (1991)	16

TABLE OF AUTHORITIES (CONTINUED)

PAGES

United States v. McKie,
951 F.2d 399 (D.C. Cir. 1991).. 15

United States v. Pirre,
927 F.2d 694 (2nd Cir. 1991)... 15

United States v. White,
766 F.Supp. 873 (E.D.
Wash. 1991)..... 16

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OPINIONS AND ORDERS BELOW

The Order of the Circuit Court of Shelby County, Alabama, suppressing test results based on waste samples obtained by the Alabama Department of Environmental Management (ADEM) and the United States Environmental Protection Agency (EPA), is not reported, but a copy of this order accompanies this petition as Appendix A.

The decision of the Court of Criminal Appeals of Alabama reversing the order of the Circuit Court of Shelby County is not yet reported, but a copy of this decision accompanies this petition as Appendix B.

The decision of the Supreme Court of Alabama reversing the decision of the Court of Criminal Appeals is not yet reported, but a copy of this decision accompanies this petition as Appendix C. The denial by the Supreme Court of Alabama of Petitioner's application for rehearing is not reported, but a copy of it accompanies this petition as Appendix D.

JURISDICTION

The decision of the Supreme Court of Alabama was issued on April 17, 1992. A timely application for rehearing filed by the State of Alabama was denied on July 10, 1992, and this petition is filed within 90 days of this date. This Honorable Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1, Amendment XIV, U.S. Constitution.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities

> of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

No statutory provisions are at issue in this proceeding.

STATEMENT OF THE CASE

Respondents were indicted in November 1988 by the Grand Jury of Shelby County, Alabama, for illegally disposing of hazardous waste; for illegally violating an order of the Alabama Department of Environmental Management (ADEM) regarding disposal of hazardous waste; and also for unlawfully failing to prepare a manifest for transportation of hazardous waste, all in violation of

Code of Alabama 1975, §22-30-19.[1] In February 1989, Respondent McRay Gingo filed a motion for production and disclosure requesting "any and all tangible evidence in the State's possession, care, custody or control relating to or consisting of ... paint, hazardous waste, sludge, drums, ..." After this motion was granted, the State advised the defendants in writing that the samples of hazardous waste which had been collected by ADEM no longer existed.

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[1]A third defendant, Robert D. White, was also indicted for related violations of Code of Alabama 1975, §22-30-19. White was a party in the Alabama Court of Criminal Appeals but did not file a petition for writ of certiorari in the Supreme Court of Alabama.

On September 4, 1990, the State of Alabama filed a motion for pretrial determination of the admissibility of evidence, in anticipation that at some point Respondents would object to the introduction into evidence of the laboratory test results on the ground that the underlying samples were not preserved for independent testing and analysis by Respondents.

On October 12, 1990, a hearing was held on the State's motion. At this hearing it was established that the ADEM samples had been destroyed in late April or early May, 1987. Furthermore, separate samples taken by the United States Environmental Protection Agency (EPA) for its own purposes and maintained in its custody and control

were destroyed in August 1989. On February 22, 1991, the Circuit Court of Shelby County entered an order finding no bad faith in the destruction of either set of samples but nonetheless suppressing the test results from both sets of samples (see Appendix A). While the trial court did not specify the basis for its decision, the briefs for both sides addressed the question of whether destruction of the samples violated the Due Process Clause of the 14th Amendment. This decision was appealed pretrial to the Court of Criminal Appeals of Alabama.

On November 27, 1991, the Court of Criminal Appeals reversed the decision of the Circuit Court, holding that because there was no bad faith in the

destruction of either set of samples there was no violation of the Due Process Clause of the 14th Amendment and the test results were admissible (see Appendix B). After rehearing was denied, Respondents filed a petition for writ of certiorari in the Supreme Court of Alabama, which petition was granted.

On April 17, 1992, the Supreme Court of Alabama reversed the decision of the Court of Criminal Appeals. The Supreme Court of Alabama agreed that there was no bad faith in the destruction of either set of samples, but recognized an exception to the doctrine of Arizona v. Youngblood, 488 U.S. 51 (1988), based upon the critical nature of the evidence destroyed. The

Supreme Court of Alabama thus held that the destruction of the samples violated the Due Process Clause of the 14th Amendment, and suppressed the test results as to both the ADEM samples and the EPA samples, even though the EPA samples were never in the State's possession (Appendix C). On July 10, 1992, the Supreme Court of Alabama denied Petitioner's application for rehearing.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SUPREME COURT OF ALABAMA CREATING AN EXCEPTION TO THE DOCTRINE OF ARIZONA v. YOUNGBLOOD IS CONTRARY TO CALIFORNIA v. TROMBETTA AND TO THE APPLICATION OF BOTH YOUNGBLOOD AND TROMBETTA BY THE COURTS OF VARIOUS JURISDICTIONS.

In the case at bar, the Supreme Court of Alabama has unilaterally created an exception to the rule of Arizona v. Youngblood, 488 U.S. 51 (1988), that a defendant must prove bad faith on the part of the prosecution in the loss or destruction of potentially exculpatory evidence in order to establish a violation of due process. In so holding, the lower court has held contrary to California v. Trombetta, 467 U.S. 479 (1984), upon which

Youngblood was based. Furthermore, the Alabama Supreme Court's decision in this case is inconsistent with the application of Youngblood and Trombetta by courts in various federal and state jurisdictions.

This case involves a prosecution for various illegal acts regarding hazardous waste. Prior to trial Respondents moved for production of all tangible evidence within the possession of the State. The State subsequently notified Respondents that the samples of the hazardous waste had been destroyed. The trial court, in a pretrial ruling, suppressed the test results as to the samples collected by the Alabama Department of Environmental Management (ADEM) and separate samples collected by the United States Environmental Protection Agency (EPA) and

maintained by EPA. This decision by the trial court was eventually upheld by the Supreme Court of Alabama.

In its ruling the Alabama Supreme Court recognized the general rule of Arizona v. Youngblood, supra, that a defendant must establish bad faith before the loss or destruction of potentially exculpatory evidence will be considered a due process violation. The lower court, however, created on its own an exception to the Youngblood rule in this case, based on the following language in the concurring opinion in Youngblood of Justice Stevens.

> In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so

> critical to the defense as to make a criminal trial fundamentally unfair.

488 U.S. at 61 (concurring opinion, Stevens, J.) The Alabama Supreme Court held in effect that because proving the hazardous nature of the waste was the heart of the State's case, the destruction of the samples was fundamentally unfair, and thus the case fit the exception recognized by Justice Stevens. Ex parte McRay Gingo, No. 1910360 (Ala. April 17, 1992), ms. op. at 6-10 (Appendix C at 31-33.

This holding by the lower court is contrary to California v. Trombetta, supra, upon which Youngblood was based. In Trombetta, which involved a charge of driving while intoxicated, the defendant was presumed to be

intoxicated if his blood alcohol level was above 0.10 percent. 467 U.S. at 482. The evidence destroyed was the breath sample from which were obtained the test results which the State intended to rely on in proving its case. Id., at 482-483. The missing evidence in Trombetta was thus as important to the State's case as that here. The Court nonetheless held that bad faith must be established in order for the suppression of the test results to be required. Id., at 488-489.

Moreover, other cases applying Trombetta and Youngblood have held in cases involving evidence similar to that here that a defendant must show bad faith in order to establish a due

process violation. In United States v. Belden, 957 F.2d 671 (9th Cir. 1992), where the charge was manufacturing marijuana, the Ninth Circuit held, citing Youngblood, that a showing of bad faith was required where the government had destroyed a number of the marijuana plants. In United States v. McKie, 951 F.2d 399 (D.C. Cir. 1991), the defendant was charged with possession of more than five grams of crack cocaine; bad faith was needed to suppress test results where the crack had been lost. In United States v. Pirre, 927 F.2d 694, 696-697 (2nd Cir. 1991), where the defendant was charged with importation of cocaine, the destruction of part of the cocaine did not result in the suppression of test

results absent bad faith. In United States v. Malbrough, 922 F.2d 458, 463 (8th Cir. 1990), cert. denied, 111 S.Ct. 2907 (1991), a prosecution for manufacturing marijuana, bad faith was required for suppression where most of the marijuana was intentionally destroyed before trial. In United States v. Donaldson, 915 F.2d 612 (10th Cir.1990), where the charge was conspiracy to possess more than 100 kilograms of marijuana, destruction of the marijuana did not result in the suppression of test results absent a showing of bad faith. In United States v. White, 766 F.Supp. 873, 884-885 (E.D. Wash. 1991), a hazardous waste prosecution like the case at bar, the consumption of the waste during testing did not require suppression of the

results without bad faith. In State v. Mabe, 412 S.Ed.2d 386 (S.C. 1991), a case involving trafficking in cocaine, suppression of test results could be based only upon a showing of bad faith. In Commonwealth v. Dennis, 588 A.2d 30 (Pa. 1991), a DUI case, destruction of a blood sample showing blood alcohol level did not require suppression of the test results without bad faith.

These cases are all similar to the instant case because in each the government, in order to make its case, had to introduce test results to prove the identity or chemical make-up of a particular substance which had been destroyed. None of the cases recognized the exception to Youngblood found by the Alabama Supreme Court.

Thus, the decision by the lower court represents a departure from the prevailing interpretation of Trombetta and Youngblood, and creates a split among the courts as to the application of those cases.

Because of division among the courts as to whether bad faith is required for a due process violation in cases involving evidence such as this, the Court should grant certiorari as to this issue.

II. THE DECISION BELOW REGARDING THE DESTRUCTION OF EVIDENCE IN THE HANDS OF A SEPARATE GOVERNMENT CONFLICTS WITH THOSE OTHER JURISDICTIONS ON THIS QUESTION

In the instant case the Supreme Court of Alabama suppressed not only

the results of tests on the samples taken by the state agency, ADEM, but also results based on EPA's samples, even though these later samples were never in the State's possession. Ex parte McRay Gingo, supra, ms. op. at 9. (Appendix C at 32-33).

This holding, which makes the State responsible for the acts of a third party government over which it has no actual control, is inconsistent with what appears to be the general rule that one government has no obligation to turn over evidence in the possession of another government. United States v. Harris, 738 F.2d 1068, 1072 (9th Cir. 1984), cert. denied, 484 U.S. 832 (1987) (no duty on federal prosecutor to turn over tapes possessed by state);

Thor v. United States, 574 F.2d 215, 220-221 (5th Cir. 1978) (no duty on federal prosecutor under Rule 16, F.R.Cr.P. to turn over address book in state possession); United States v. Bermudez, 526 F.2d 89, 100 n. 9 (2nd Cir. 1975), cert. denied, 425 U.S. 970 (1976) (no duty on federal prosecutor under Jencks Act to turn over material in state investigator's file). While these cases do not specifically address the question of whether one government can be held on constitutional grounds to be responsible for the acts of another, they at least imply that this is not the case.

Because of the difference between the holding in the case below and those in other cases regarding the responsibility of a government for evidence in

the possession of a third party, the Court should grant certiorari to decide this issue.

CONCLUSION

As has been shown above, the holding of the Supreme Court of Alabama regarding the two questions discussed above are in conflict with both those of this Court and those of the courts of various other jurisdictions. For

this reason the Court should grant certiorari to address these questions.

Respectfully submitted,

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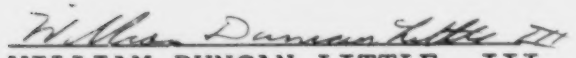

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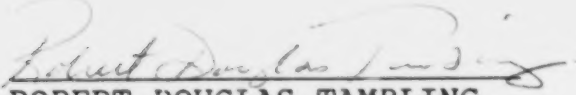

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